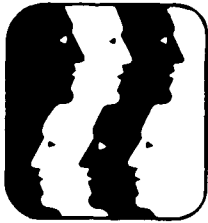


INTERNAL GOVERNMENT REVIEW OF AGENCIES



The Reporter summarizes below the activities of those entities within State government which regularly review, monitor, investigate, intervene or oversee the regulatory boards, commissions and departments of California.

OFFICE OF ADMINISTRATIVE LAW

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The Office of Administrative Law (OAL) was established on July 1, 1980, during major and unprecedented amendments to the Administrative Procedure Act (AB 1111, McCarthy, Chapter 567, Statutes of 1979). OAL is charged with the orderly and systematic review of all existing and proposed regulations against six statutory standards—necessity, authority, consistency, clarity, reference and nonduplication. The goal of OAL's review is to "reduce the number of administrative regulations and to improve the quality of those regulations which are adopted" OAL has the authority to disapprove or repeal any regulation that, in its determination, does not meet all six standards.

OAL also has the authority to review all emergency regulations and disapprove those which are not necessary for the immediate preservation of the public peace, health and safety or general welfare.

Under Government Code section 11347.5, OAL is authorized to issue determinations as to whether state agency "underground" rules which have not been adopted in accordance with the Administrative Procedure Act (APA) are regulatory in nature and legally enforceable only if adopted pursuant to APA requirements. These non-binding OAL opinions are commonly known as "AB 1013 determinations," in reference to the legislation authorizing their issuance.

MAJOR PROJECTS:

AB 1013 Determinations. The following determinations were issued and published in the *California Regulatory Notice Register* in recent months:

-June 6, 1989, OAL Determination No. 10, Docket No. 88-012. OAL determined that certain procedures followed by the Department of Fish and Game

(DFG) to conform its commercial salmon fishing regulations to the Pacific Fishery Management Council's (PFMC) annual Fishery Management Plan are not regulations within the meaning of the APA and are not subject to the requirements of the Act.

The issue arose when the DFG Director amended the PFMC plan to allow small boat fishers in the Shelter Cove area a limited catch which could be landed locally. This modification adversely affected commercial fisheries, which were still required to run fifty miles to fish in open waters under the PFMC's plan. OAL cited sections 7652 and 7652.2 of the Fish and Game Code, which authorize the DFG director to conform state law or regulations to the plan "if the director finds that the action is necessary to achieve optimum yield in California." Against a challenge that the DFG director had interpreted and expanded the term "optimum yield" in amending section 182.1, Title 14, California Code of Regulations, OAL found that the director had applied only statutory criteria and had not improperly expanded them into underground rulemaking.

-July 25, 1989, OAL Determination No. 11, Docket No. 88-014. In this determination, OAL concluded that portions of the Department of Corrections' Administrative Manual concerning inmates' legal matters, including sections regarding subpoenas for inmate records and procedures for inmate litigation, are regulations which must be adopted pursuant to the APA. Other portions of the oft-challenged manual were found to relate solely to the internal management of the Department, and as such do not require compliance with the Act. The remaining sections reiterate existing statutes and are not regulations.

-July 25, 1989, OAL Determination No. 12, Docket No. 88-015. Here, OAL determined that a Board of Examiners in Veterinary Medicine (BEVM) policy statement regarding dental cleaning is a

regulation subject to the APA. As such, it may not be enforced until it has been promulgated pursuant to the APA. The policy statement, contained in a letter to an Orange County pet grooming shop, asserted that preventive dental procedures regularly performed by non-veterinarian groomers may be performed only by a licensed veterinarian or a vet-supervised animal health technician.

This OAL ruling is yet another chapter in BEVM's longtime quest to adopt a rule defining animal teeth cleaning as a "dental operation" and precluding non-veterinarians from performing teeth cleaning services. (See *infra* agency report on BEVM and CRLR Vol. 9, No. 3 (Summer 1989) p. 73 for extensive background information.) After a lengthy rulemaking proceeding, BEVM adopted such a rule on October 23, 1988, only to have it rejected by the Director of the Department of Consumer Affairs on March 22, 1989. OAL's ruling rejects BEVM's claim that section 4826 of the Business and Professions Code authorizes it to ban non-veterinarian teeth cleaning without implementing regulations.

Department of Personnel Administration Training Program. In recent years, a dwindling number of state agency employees are able to supervise and perform agency rulemaking functions. In response to this shortage, OAL staff attorneys, in cooperation with the Department of Personnel Administration (DPA), have developed a three-day training program to instruct employees in this area. OAL and DPA hope to create a pool of qualified employees who understand the APA requirements and can perform as rulemaking specialists.

State agencies have been generally supportive of the program and have taken advantage of the training for their employees. OAL hopes to continue the program until each agency is no longer at risk of losing its regulatory specialists through retirement.

LEGISLATION:

AB 855 (Felando), as amended September 7, requires OAL to notify state agencies of its intent to repeal a regulation. This bill was signed by the Governor (Chapter 1170, Statutes of 1989). (See CRLR Vol. 9, No. 3 (Summer 1989) p. 28 for background information.)

AB 2196 (Campbell) would exempt the Fish and Game Commission (FGC) from certain provisions of the APA when conducting a rulemaking proceeding on a petition to list a species as endangered or threatened. Although FGC is required



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to hold at least two public hearings on any such petition, this bill would provide that only the record from the final hearing is required to be submitted to OAL, if FGC determines the petition is warranted. AB 2196 is a two-year bill pending in the Assembly Committee on Water, Parks and Wildlife.

LITIGATION:

In *California Coastal Commission v. Office of Administrative Law, et al.*, No. A039703 (1st Dist., May 17, 1989), the California Supreme Court denied OAL's petition for review by a 3-4 vote. (See CRLR Vol. 9, No. 3 (Summer 1989) p. 28 for background information on this case.)

In *California Chapter of the American Physical Therapy Ass'n et al., v. California State Board of Chiropractic Examiners, et al.*, Nos. 35-44-85 and 35-24-14 (Sacramento Superior Court), petitioners and intervenors challenge the Board's adoption and OAL's approval of section 302 of the Board's rules, which defines the scope of chiropractic practice. In January 1989, the court preliminarily invalidated provisions of section 302 permitting chiropractors to perform colonics and enemas, pre- and post-natal obstetric care, physical therapy, ultrasound, thermography, and soft tissue manipulation. However, the court recently granted in part the Board's motion for reconsideration of the previous ruling, and preliminarily reinstated the provisions allowing chiropractors to perform physical therapy, ultrasound, thermography, and soft tissue manipulation. In light of this ruling, petitioner California Medical Association has indicated its intent to file an amended complaint which will substantially narrow the issues in the case; that filing was expected by mid-November. A status conference is scheduled for January 5, 1990. (See CRLR Vol. 9, No. 3 (Summer 1989) p.28 and Vol. 9, No. 2 (Spring 1989) p. 37 for background information on this case.)

OFFICE OF THE AUDITOR GENERAL

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The Office of the Auditor General (OAG) is the nonpartisan auditing and investigating arm of the California legislature. OAG is under the direction of the Joint Legislative Audit Committee (JLAC), which is comprised of fourteen members, seven each from the Assembly

and Senate. JLAC has the authority to "determine the policies of the Auditor General, ascertain facts, review reports and take action thereon...and make recommendations to the Legislature...concerning the state audit...revenues and expenditures...." (Government Code section 10501.) OAG may "only conduct audits and investigations approved by" JLAC.

Government Code section 10527 authorizes OAG "to examine any and all books, accounts, reports, vouchers, correspondence files, and other records, bank accounts, and money or other property of any agency of the state...and any public entity, including any city, county, and special district which receives state funds...and the records and property of any public or private entity or person subject to review or regulation by the agency or public entity being audited or investigated to the same extent that employees of that agency or public entity have access."

OAG has three divisions: the Financial Audit Division, which performs the traditional CPA fiscal audit; the Investigative Audit Division, which investigates allegations of fraud, waste and abuse in state government received under the Reporting of Improper Governmental Activities Act (Government Code sections 10540 *et seq.*); and the Performance Audit Division, which reviews programs funded by the state to determine if they are efficient and cost effective.

RECENT AUDITS:

Report No. P-768 (May 1989) is entitled "The Chancellor's Office of the California Community Colleges Has Developed Procedures That Result in a Circumvention of Many State Fiscal Controls." The Chancellor's Office of the California Community Colleges (Chancellor's Office) is the administrative arm of the Board of Governors of the California Community Colleges, and serves primarily as a planning, reporting, advising, and regulating agency for the seventy California community college districts. The Chancellor of the California Community Colleges is appointed by the Board of Governors. The legislature appropriates funds to the Board of Governors for the support of the Chancellor's Office and for local assistance activities such as educational programs at community college districts.

OAG was initially charged with examining the relationship between the Chancellor's Office and its fiscal agents, including various community college districts and the Community College Foundation (Foundation). The Foundation was estab-

lished by the Board of Governors in 1983 for the purpose of assisting and promoting the educational activities of the Board of Governors on behalf of the California Community Colleges. OAG sought to determine whether the Chancellor's Office had used its fiscal agents in ways which bypass the state's civil service system and fiscal controls.

This audit led to the arrest of the former acting Dean of Special Services, an employee of the Chancellor's Office. He was charged with grand theft of state funds and conflict of interest involving over \$950,000 in payments issued by four community college districts acting as the Chancellor's Office's fiscal agents. As a result of the alleged theft, OAG expanded the scope of its audit to include a comprehensive review of fiscal activities and internal controls related to the Student Services and Special Programs Unit, covering the period from October 1986 through December 1988.

OAG's findings indicate that the Chancellor's Office used a variety of methods to bypass the state's controls over receipts, expenditures, and hiring. The report includes recommendations to the Chancellor's Office and the legislature to ensure appropriate use of the state's funds. OAG also suggested that the Chancellor's Office's legal counsel review all contract proposals (as is required by its contracts manual) to ensure that the Chancellor's Office adheres to all applicable civil service standards.

Report No. P-827 (August 1989) concerns the operation and funding of the Public Utilities Commission's (PUC) California Relay Service (CRS) for the deaf and hearing-impaired. The relay service allows deaf and severely hearing-impaired individuals in California to use telephones to communicate with hearing individuals in California. OAG found that although the PUC has taken steps to promote program efficiencies, the Commission has not fully ensured that the relay service is operated in the most cost-efficient manner. The PUC could reduce the expenses of the relay service by using a less expensive long distance service provided by AT&T, by using another provider of long distance service, or by using another method of providing access to the relay service. Depending on the alternative selected by the Commission, the savings could range from at least \$1.1 million to approximately \$2.6 million annually. However, even considering the proposed expense reductions, the Deaf Equipment Acquisition Fund Trust (DEAF Trust), which funds the relay service and equipment programs